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45 **UNITED STATES DISTRICT COURT**
46 **DISTRICT OF NEVADA**

47 ORACLE USA, INC., a Colorado corporation;
48 and ORACLE INTERNATIONAL
49 CORPORATION, a California corporation,

50 Plaintiffs,

51 v.

52 RIMINI STREET, INC., a Nevada corporation,
53 and SETH RAVIN, an individual,

54 Defendants.

55 Case No. 2:10-cv-0106-LRH-PAL

56 **DEFENDANTS RIMINI STREET, INC.'S**
57 **AND SETH RAVIN'S BRIEF**
58 **REGARDING VERDICT FORM**

59 Judge: Hon. Larry R. Hicks

1 Defendants Rimini Street, Inc. and Seth Ravin (unless otherwise specified, referred to
 2 together as “Rimini”) hereby submit the following additional objections to the Court’s proposed
 3 verdict form, distributed to the parties on October 5, 2015. Specifically, Rimini suggests revisions to
 4 Questions 6, 6b, 7, and 8.

5 **A. INFRINGER’S PROFITS NOT DUPLICATIVE OF LOST PROFITS**

6 The jury’s award of infringer’s profits may not be duplicative of its lost profits award. 17
 7 U.S.C. § 504(b); *see also* Jury Instr. Copyright Infringement – Damages – Defendant’ Profits.

8 However, Question 6b – “Defendant’s Profits” – does not state that the award of infringer’s
 9 profits may not be duplicative of lost profits. Thus, Rimini proposes an additional sentence that will
 10 ameliorate the risk of duplicative damages (changes in underline), which is entirely consistent with
 11 the Court’s jury instructions:

12 **Question 6b: Defendant’s Profits**

13 What amount of Defendant’s Profits, if any, has Oracle International Corporation
 14 proven by a preponderance of the evidence for all acts of copyright infringement
 15 engaged in by defendant Rimini Street? Only include in this amount those
 16 Defendant’s Profits that were not also taken into account in computing your lost
 17 profits award, if any. If you found in Questions 1 through 3 that Rimini Street did not
 18 engage in copyright infringement as to a particular copyrighted work, please do not
 19 consider that copyrighted work in your damages award.

20 **B. CONTRIBUTORY AND VICARIOUS COPYRIGHT DAMAGES**

21 Seth Ravin can only be liable for contributory or vicarious copyright infringement damages
 22 *that were already* awarded against Rimini Street. *See* Copyright Infringement – Contributory
 23 Infringement; Copyright Infringement – Vicarious Infringement. In other words, if the jury
 24 concludes that Rimini Street is liable for \$100 in copyright infringement damages, it must then
 25 determine which portion of *that* award Seth Ravin is vicariously (or contributorily) liable, but the jury
 26 may not award \$200 in *additional* damages against Seth Ravin for copyright infringement. Such
 27 damages are necessarily *not* vicarious or contributory damages.

1 However, as written, Questions 7 and 8 suggest that the jury may award additional damages
 2 against Seth Ravin that were not awarded against Rimini Street. Rimini therefore proposes the
 3 following revision to ameliorate the risk of an unlawful additur:

4 **Question 7: Contributory Infringement Damages**

5 If you found that defendant Seth Ravin engaged in contributory copyright
 6 infringement, what amount which portion of the actual damages award that you
 7 awarded against Rimini Street do you find Seth Ravin is contributorily liable for?

8 **Question 8: Vicarious Infringement Damages**

9 If you found that defendant Seth Ravin engaged in vicarious copyright infringement,
 10 what amount which portion of the actual damages award that you awarded against
 11 Rimini Street do you find Seth Ravin is vicariously liable for?

12 See *Clear One Communications, Inc. v. Biamp Systems*, 653 F.3d 1163, 1180 (10th Cir. 2011)
 13 (reversing award of \$1,912,000 as an improper additur because it was ambiguous whether jury meant
 14 to award \$956,000 against *each* defendant or \$956,000 against two defendants jointly and severally).

15 **C. IMPROPER ADVISORY OPINION ON ACTUAL DAMAGES**

16 Question 6 correctly permits the jury to select the “best measure of Oracle International
 17 Corporation’s actual damages.” However, it goes on to state that “Regardless of whether you find
 18 that Lost Profits or a Fair Market Value License is the best measure of actual damages in this action,
 19 please answer all three of the following questions.” In other words, it asks the jury to calculate (i)
 20 lost profits, (ii) defendant’s profits, *and* (iii) fair market value license—even though the jury will only
 21 choose either lost profits *or* the fair market value license as the proper amount of damages.

22 This portion of the verdict form (which was added at Oracle’s request) is contrary to law and
 23 inconsistent with the Court’s instructions to this jury. The Copyright Act allows Oracle to recover its
 24 lost profits or the fair market value of a license; it does not entitle Oracle to a jury determination on
 25 both alternative measures. The Court’s instruction on “Copyright Infringement—Damages—
 26 Introduction,” with which both parties are in agreement, correctly reflects this legal standard: “As the
 27 measure of its actual damages, Oracle International Corporation, as the plaintiff, has the right to seek
 28 to recover either the fair market value of a license for the rights infringed or its lost profits, not both.

1 You must make the determination of which type of damages to award to Oracle International
 2 Corporation if you determine those damages are proved by a preponderance of the evidence”
 3 (emphasis added). The verdict form, by asking the jury to determine both lost profits and fair market
 4 value of a license, contravenes the Copyright Act and the Court’s own instruction on this point. This
 5 part of the form should therefore be stricken.

6 In addition, the verdict form as written calls for an improper advisory opinion from the jury.
 7 See *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1560 (11th Cir. 1988) (trial court’s conditional
 8 rulings concerning damages, in the event its ruling on the motion for judgment notwithstanding the
 9 verdict was reversed, were “advisory” only and were not binding); *O’Neill v. United States*, 411 F.2d
 10 139, 146 (3d Cir. 1969) (trial court’s conditional assessment of damages, in the event the defendant’s
 11 judgment was reversed on appeal, bore the characteristic of an “advisory opinion,” was “purely
 12 academic” when made, “and did not pass through the refining pressure of reality”). That is because
 13 only one form of damages (lost profits *or* fair market value license) can be imposed on defendants.
 14 E.g., *Oracle Corp. v. SAP AG*, 765 F.3d 1081, 1087 (9th Cir. 2014).

15 Advisory opinions from a jury are proper only on questions for resolution by the Court (see
 16 Fed. R. Civ. P. 39(c); 9 Wright & Miller, *Federal Practice and Procedure* § 2335 (3d ed. 2008)
 17 (“when the trial court’s decision to treat a jury as advisory rather than as of right implicates the
 18 possibility that a party’s Seventh Amendment rights are at stake”)), which the amount of copyright
 19 damages is not (*Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 345-46 (1998)). And in
 20 any event, advisory opinions by the jury are not binding. *Beacon v. Theatres v. Westover*, 359 U.S.
 21 500, 507-11 (1959); *Goodgame v. American Cast Iron Pipe Co.*, 75 F.3d 1516, 1520 (11th Cir. 1996)
 22 (“When advisory jury is empaneled under Rule 39(c), its findings of fact are not binding on the trial
 23 court”). As a result, any damages award the jury imposes that is not based on what the jury elects as
 24 the “best measure” of damages would not be binding and would violate the Seventh Amendment.
 25 *Experience Hendrix LLC v. Hendrixlicensing.com Ltd.*, 762 F.3d 829, 847 (9th Cir. 2014) (reversing
 26 award where, *inter alia*, it “told jurors to consider these two measures of damages separately, and the
 27 verdict form provided separate places to insert damages for a loss of reputation and damages for loss
 28 of good will” “without regard to whether any award was duplicative”); *Long v. Gill*, 2014 WL

1 3512507, at *1 (D. Or. July 10, 2014) (granting motion to amend judgment where plaintiffs sought
 2 “the same damages from alternative theories”); *Countrywide Home Loans v. Thitchener*, 192 P.3d
 3 243, 248 (Nev. 2008) (“While plaintiffs are permitted to plead alternative or different theories of
 4 relief based on the same facts, plaintiffs may not recover more than their total loss plus any punitive
 5 damages assessed”).

6 Thus, Rimini Street proposes the following additional language to avoid the risk of an
 7 improper advisory opinion:

8 ~~Regardless of whether you find that Lost Profits or a Fair Market Value License is the
 9 best measure of damages in this action please answer all three of the following
 10 questions, Questions 6a, 6b, and 6c.~~

11 If you selected actual damages in the form of lost profits, answer Questions 6a and 6b.

12 If you selected actual damages in the form of hypothetical license, answer Question
 13 6c.

14 **D. IMPACT OF ORACLE’S WITHDRAWAL OF ITS CFAA CLAIM**

15 Following the parties’ conference with the Court on October 5, 2015, Oracle withdrew its
 16 Federal Computer Fraud and Abuse Act claim via email correspondence with the Court and Rimini.
 17 Accordingly, Questions 17 and 18 should be removed. And because Oracle pleads the two remaining
 18 State Computer Access Claims in the alternative, the second half of Questions 19, 20, 21, and 22,
 19 should be consolidated as follows:

20 If you answered yes to Questions 19 or 21¹, for either defendant, what amount of
 21 damages did that violation cause to Oracle America, Inc.? If you did not answer yes
 22 to the above question as to a particular defendant please write N/A in the appropriate
 23 space provided.

24 Rimini Street \$ _____

25 Seth Ravin \$ _____

27 ¹ These numbers will be 17 and 19 should the Court remove Questions 17 and 18 as a result of
 28 Oracle’s withdrawal of its Federal Computer Fraud and Abuse Act.

If you answered yes to Questions 20 or 22², for either defendant, what amount of damages did that violation cause to Oracle International Corporation? If you did not answer yes to the above question as to a particular defendant please write N/A in the appropriate space provided.

Rimini Street _____ \$ _____

Seth Ravin _____ \$ _____

CONCLUSION

For the foregoing reasons, Rimini respectfully requests that the Court revise Questions 6, 6b, 7 and 8, to avoid the risks of duplicative damages, an unlawful additur, and an improper advisory opinion.

DATED: October 6, 2015

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By: Blaine H. Evanson
Blaine H. Evanson

*Attorneys for Defendants
Rimini Street, Inc. and Seth Ravin*

² These numbers will be 18 and 20 should the Court remove Questions 17 and 18 as a result of Oracle's withdrawal of its Federal Computer Fraud and Abuse Act.

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2015, I caused to be electronically filed the foregoing document with the clerk of the court for the U.S. District Court, District of Nevada, using the electronic case filing system. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

By: Blaine H. Evanson
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